COURT OF APPEALS
DECISION
DATED AND FILED

August 6, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1173-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

KELLY A. BIBLE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Reversed and remanded for further proceedings.*

ROGGENSACK, J.[1] The State of Wisconsin appeals from an order of the circuit court dismissing charges against Kelly Bible for operating a motor vehicle while intoxicated (OMVWI), second offense, and operating a motor vehicle with a prohibited alcohol concentration (PAC), second offense, in

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

violation of §§ 346.63(1)(a) and 346.63(1)(b), STATS., respectively. The circuit court dismissed the charges because § 346.61, STATS., which states that §§ 346.62 to 346.64, STATS., are applicable upon "all premises held out to the public for use of their motor vehicles," does not apply to Bible, who was operating a vehicle which was only partially on the paved surface of a parking lot held open to the public and partially on a grassy area adjacent to the paved surface. We conclude that whether the grassy area adjacent to the Governor Dodge Motor Inn parking lot was implicitly "held out to the public for use of their motor vehicles," is a factual determination grounded on the owner's intent; and therefore, we reverse and remand for further proceedings.

BACKGROUND

On December 5, 1997, Lee Ford, Bible's companion, drove Bible's vehicle from Highway 151 into a ditch adjacent to the Governor Dodge Motor Inn ("the Motel"). When the police arrived at the scene, they found Bible in the driver's seat operating the vehicle partially in a grassy area adjacent to the paved portion of the Motel parking lot, in an attempt to get it fully onto the paved surface. One or two tires[2] of the vehicle were on the paved surface of the Motel's parking lot. Bible told the police that he was drunk, and a blood sample later confirmed his intoxication.

On April 10, 1998, at the hearing on Bible's motion to dismiss, Bible again admitted that he was under the influence of intoxicants when he operated the vehicle on December 5, 1997. The circuit court concluded that, although Bible operated the vehicle while intoxicated, he did not operate the

[2] The evidence in this regard was in dispute at the hearing on Bible's motion to dismiss.

vehicle on "premises held out to the public for use of their motor vehicles" because the vehicle was only partially on the Motel's paved parking lot area. The circuit court granted Bible's motion to dismiss when it concluded that operating the vehicle partially on the lot was insufficient to satisfy the statute as a matter of law. This appeal followed.

DISCUSSION

Standard of Review.

A motion to dismiss can be granted only if under no circumstances can the State prevail. *See* ***Heinritz v. Lawrence University***, 194 Wis.2d 606, 610-11, 535 N.W.2d 81, 83 (Ct. App. 1995). The question now before us is whether the circuit court's statutory interpretation, which we decide *de novo*, without deference to the circuit court, is correct as a matter of law. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis.2d 226, 233, 568 N.W.2d 31, 34 (Ct. App. 1997).

Section 346.61, STATS.

Bible was charged with violating § 346.63(1)(a) and (b), STATS., which state in relevant part, "No person may drive or operate a motor vehicle while: (a) Under the influence of an intoxicant …; or (b) [with] a prohibited alcohol concentration." There is no question that Bible was operating the vehicle while intoxicated or that he had a prohibited alcohol concentration. Rather, the question in this case involves an interpretation of § 346.61, STATS.

Section 346.61, STATS., states in relevant part, "In addition to being applicable upon highways, ss. 346.62 to 346.64 are applicable upon all premises held out to the public for use of their motor vehicles." The parties do not dispute that the paved area of the Motel parking lot is a "premises held out to the public

for use of their motor vehicles." ***City of La Crosse v. Richling***, 178 Wis.2d 856, 859-60, 505 N.W.2d 448, 449 (Ct. App. 1993) (concluding that a tavern parking lot restricted to customer use was "held out to the public for use of their motor vehicles"). Rather, the question we are asked to decide is whether operating a motor vehicle with at least one tire on the paved surface of the Motel parking lot is operating a motor vehicle on "premises held out to the public for use of their motor vehicles." However, it is unnecessary to address this issue because the relevant question is whether the position of the vehicle, with a portion on the grassy area adjacent to the Motel parking lot and a portion on the paved surface, located the vehicle on an area "held out to the public for use of their motor vehicles."

The test for determining whether areas are "held out to the public for use of their motor vehicles" is "whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the (area in question) in an authorized manner." ***Id.*** at 860, 505 N.W.2d at 449. In other words, the owner of the premises must have intended the area to be open to the public. ***City of Kenosha v. Phillips***, 142 Wis.2d 549, 554, 419 N.W.2d 236, 238 (1988).

Whether the owner intended the premises to be open to the public is a question of fact which can be determined by direct, demonstrative, testimonial, or circumstantial evidence, or even upon the basis of judicial notice. ***Id.*** at 558, 419 N.W.2d at 239. Holding out to the public can be established by the owner's action or inaction. The requisite intent can be explicit or implicit. ***Id.*** While either action or inaction will, in appropriate circumstances, constitute a holding out to the public, the burden of proof is on the proponent of the applicability of the statute. ***Id.*** at 558-59, 419 N.W.2d at 239-40.

In ***Phillips***, the supreme court ruled that a man found passed out at the wheel of his still running car in an American Motors Company employee parking lot could not be charged with an OMVWI because the lot was intended solely for the use of AMC employees. ***Id.*** at 557-58, 419 N.W.2d at 239. The court concluded that the lot was not a "premises held out to the public for use of their motor vehicles" because signs posted in the lot stated that it was an employee parking lot and that violators would be towed away. *See* ***id.*** at 552-53, 419 N.W.2d at 237.

There is no evidence in the case at hand that the grassy area adjacent to the Motel paved parking area was posted with signs indicating that it was off limits to the public. Therefore, it is possible that the Motel owner would not have charged a person with trespassing for operating his vehicle partially on the grassy area as Bible was doing when the police arrived. Additionally, we do not know the owner's intent if the paved surface of the parking lot were full of cars, *i.e.,* would the Motel have implicitly intended that the overflow park on adjacent grassy areas. However, evidence of the owner's intent to hold out the grassy area as open to the public, or that driving partially on the grass was not intended under any circumstances are fact questions which must be determined in a proceeding before the circuit court. ***Id.*** at 558, 419 N.W.2d at 239.

In taking testimony to establish the factual predicate for the construction of § 346.61, STATS., the circuit court should keep in mind the purpose of § 346.63, which was well articulated in ***State v. Modory***, 204 Wis.2d 538, 544, 555 N.W.2d 399, 401 (Ct. App. 1996):

> [T]he purpose of the statute is to deter a person who is intoxicated from getting behind the wheel of a motor vehicle in the first instance, rather than to have a court or

> jury make a fine distinction later whether the person was in a position to cause harm.

CONCLUSION

Whether the grassy area adjacent to the paved surface of the Motel parking lot was implicitly "held out to the public for use of their motor vehicles," or whether operating vehicles partially on the grassy surface would not be permitted by the owner under any circumstances are questions of fact which we cannot resolve. Therefore, we reverse and remand for further proceedings consistent with this opinion.

By the Court.—Reversed and remanded for further proceedings.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4., STATS.